UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Luis Vega Plaintiff, v. George Ripley, individually and In his capacity as a police officer For York City Police Department, City of York, City of York Police Department, and John Does 1-10 Defendants.	:	Civil Action No. 1:CV-11-2015 Judge Conner **JURY TRIAL DEMANDED**

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE CARLSON

Defendants, by and through their counsel, Marshall Dennehey Warner Coleman & Goggin, hereby respond to and oppose Plaintiff's Objections to the Report and Recommendation of Magistrate Judge Carlson as follows:

1. Denied. Plaintiff failed to present evidence supporting a malicious prosecution claim as a matter of law.

2. Denied. Magistrate Judge Carlson correctly determined that Detective Ripley is entitled to qualified immunity.

3. Denied. The undisputed facts of record demonstrate that Defendants are entitled to summary judgment as a matter of law.

WHEREFORE, Defendants respectfully request that this Honorable Court deny Plaintiff's Objections to the Report and Recommendation of Magistrate Judge Carlson and enter judgment in favor of Defendants and against Plaintiff.

Respectfully submitted,

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

BY: *s/John P. Gonzales*
JOHN P. GONZALES, ESQUIRE
Identification Number: 71265
2000 Market Street, Suite 2300
Philadelphia, PA 19103
Phone: (215) 575-2871
Fax: (215) 575-0856

Attorney for Defendants

Dated: July 8, 2013

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Luis Vega Plaintiff, v. George Ripley, individually and In his capacity as a police officer For York City Police Department, City of York, City of York Police Department, and John Does 1-10 Defendants.	:	Civil Action No. 1:CV-11-2015 Judge Conner **JURY TRIAL DEMANDED**

BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE CARLSON

I. INTRODUCTION AND FACTUAL BACKGROUND

Plaintiff, Luis Vega initiated the instant action by filing a Complaint with the Court on October 28, 2011. In his Complaint, Plaintiff sets forth claims against Detective George Ripley and the City of York Police Department pursuant to Section 1983 in connection with his arrest following a shooting in the City of York on September 30, 2009. Specifically, Plaintiff asserted claims for malicious prosecution in violation of his Fourth and Fourteenth Amendment Rights against Detective George Ripley and a ***Monell*** claim against the City of York.

On July 18, 2012, Defendants filed their motion for summary judgment, requesting dismissal of all claims asserted by Plaintiff. Plaintiff opposed dismissal of the claims against Detective Ripley but did not oppose the dismissal of the ***Monell*** claim against the City of York.

On May 15, 2013, Magistrate Judge Carlson issued a comprehensive, thirty-five page Report and Recommendation and determined that "defendant Ripley could reasonably rely on the eyewitness photo line-up identification to conclude that probable cause existed [for the arrest of plaintiff], and that his actions are therefore cloaked with qualified immunity." See Report and Recommendation, at p. 22. Moreover, Magistrate Judge Carlson further noted that Detective Ripley is entitled to qualified immunity on plaintiff's malicious prosecution claim and further noted that plaintiff failed to establish that Detective Ripley (a) initiated criminal proceedings against plaintiff; (b) did not have probable cause to arrest plaintiff and (c) harbored any malice toward plaintiff. As Magistrate Judge Carlson correctly decided this matter based on controlling law, Plaintiff's objections to the Report and Recommendation of Magistrate Judge Carlson must be denied and summary judgment must be granted in favor of Defendants.

II. STANDARD OF REVIEW

It is well established that, pursuant to 28 U.S.C. § 636 (b)(1)(C) and Federal Rule of Civil Procedure 72, a District Judge shall conduct a *de novo* review of a Magistrate Judge's Report and Recommendation upon the filing of "specific, written objections to the proposed findings and recommendations." Moreover, "[g]eneral or blanket objections do not comply with Rule 72(b) and need not be addressed by the District Court." ***Palmer v. Apfel***, *995 F. Supp. 549, 552 n.4 (E.D. Pa. 1998)*. As a result, the Court should apply the same summary judgment standard utilized by the Magistrate Judge with regard to any "specific objections" raised by the plaintiff.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; ***Hines v. Consolidated Rail Corp.***, *926 F.2d 262, 267 (3d. Cir. 1991)*. In reviewing a motion for summary judgment, the court must view the facts and all inferences drawn therefrom in the light most favorable to the non-moving party. ***Groman v. Township of Manalapan***, *47 F.3d 626 (3d. Cir. 1995)*. The role of the court is not to weigh the evidence and determine the truth of the matter, but to determine whether, construing the facts and inferences therefrom in the light most favorable to the non-moving party, there is a genuine issue for resolution at trial. ***Anderson v. Liberty Lobby, Inc.***, *477 U.S. 242, 249 (1986)*.

A party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. ***Celotex Corp. v. Catrett***, *477 U.S. 317, 323 (1986)*. If the moving party makes a showing, the burden is on the non-moving party to demonstrate that there is a genuine issue of material fact by coming forward with sufficient evidence from which a reasonable jury could return a verdict for the non-moving party. ***United States v. 107.9 Acre Parcel of Land in Warren Township***, *898 F.2d 396, 398 (3d. Cir. 1990)*.

In opposing a Motion for Summary Judgment, Plaintiff bears the burden of presenting facts to show that there is a genuine issue for trial as to the essential elements of his claims. ***Celotex Corp.***, *477 U.S. at 324*. To meet this burden, Plaintiff cannot rely on the allegations in the pleadings, nor on conclusory assertions, unsupported by evidence, that a factual dispute exists. ***Gray v. York Newspapers, Inc.***, *957 F.2d 1070, 1085 (3d. Cir. 1992)*. Further, mere speculation, suspicion, metaphysical doubt or evidence that is not sufficiently probative will not defeat summary judgment. ***Id.*** Here, as correctly noted by Magistrate Judge Carlson, there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

III. ARGUMENT

A. Plaintiff Failed to Present Evidence Supporting a Malicious Prosecution Claim as a Matter of Law.

Plaintiff's objections to Magistrate Judge Carlson's Report and Recommendation argues that Plaintiff "has offered ample evidence in support of each element of his malicious prosecution claim." Despite Plaintiff's objections, the facts of record establish that Plaintiff failed to demonstrate that (a) Detective Ripley—as opposed to the prosecutors—initiated a criminal proceeding against Plaintiff; (b) Detective Ripley did not have probable cause to arrest Plaintiff; and (c) Detective Ripley acted maliciously toward Plaintiff.

It is well-established that in order to make out a claim of malicious prosecution, a plaintiff must show that (1) the defendant initiated a criminal proceeding against the plaintiff; (2) the criminal proceeding ended in plaintiff's favor; (3) the defendant initiated the proceeding without probable cause; (4) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding. ***Dice v. Johnson***, *711 F. Supp. 2d 340, 364-65 (M.D. Pa. 2010), quoting,* ***Johnson v. Knoor***, *477 F.3d 75, 81-82 (3d Cir. 2007).*

1. Plaintiff Failed to Present Evidence Establishing that Detective Ripley Initiated a Criminal Proceeding Against Plaintiff.

It is equally well-established that, "[i]n most cases, a prosecutor rather than a police officer initiates a criminal prosecution" and "[a] plaintiff can proceed against a police officer for malicious prosecution only if the officer 'fails to disclose exculpatory evidence to prosecutors, makes false or misleading reports to the prosecutor, omits material information from the reports, or otherwise interferes with the prosecutor's ability to exercise independent judgment in deciding whether to prosecute.'" *See* Report and Recommendation, at pp. 25-26, *quoting*, ***Zeglen v. Miller***, *2008 U.S. Dist. LEXIS 20344, *31 (M.D. Pa. 2008).*

As Magistrate Judge Carlson correctly noted, Plaintiff does not allege that Detective Ripley withheld evidence, made false or misleading reports or otherwise interfered with the prosecutor's ability to exercise independent judgment in deciding whether to prosecute Plaintiff. Rather, Plaintiff objects to Magistrate Judge Carlson's Report and Recommendation and argues that Detective Ripley "omitted material facts from the affidavit of probable cause" and that Plaintiff would never have been arrested as a result. Specifically, Plaintiff argues that the victim was heavily medicated when he identified Plaintiff as the person who shot him, Detective Ripley's photo array "was flawed" and the affidavit of probable cause does not mention that the victim's girlfriend did not identify Plaintiff when she was shown the photo array. Despite these objections, Magistrate Judge Carlson correctly determined that Plaintiff failed to present evidence establishing that Detective Ripley "omitted material information" from his report and expressly found that "it cannot reasonably be argued that, had [the information plaintiff complains about] been included in his report, prosecutors would have taken different action in bringing charges against [Plaintiff]." *See* Report and Recommendation, at p. 27.

Indeed, while Plaintiff alleges that the victim was "heavily medicated," the undisputed facts of record demonstrate that the victim "was alert and able to follow instructions and respond to questions." Moreover, while Plaintiff alleges that the photo array was "flawed," this was simply not the case. To the contrary, the photographs used for the array were obtained directly from PennDot's system and the photo lineup was "compiled based on their resemblance to [Plaintiff's] complexion and race." Finally, while Plaintiff argues that the victim's girlfriend failed to identify Plaintiff as the shooter, such information was not material. Indeed, Detective Ripley received information from an informant that Plaintiff was bragging about the shooting and the victim provided a positive identification of Plaintiff as the shooter. From this, it is clear that "it cannot reasonably be argued that, had [this information] been included in his report, prosecutors would have taken different action in bringing charges against [Plaintiff]." Accordingly, as Plaintiff has failed to present evidence that Detective Ripley initiated a criminal proceeding against Plaintiff, Plaintiff's malicious prosecution claim must be dismissed as a matter of law.

2. Plaintiff Failed to Present Evidence Establishing that Detective Ripley Did Not Have Probable Cause to Arrest Plaintiff.

Probable cause is established upon the facts and circumstances available to the officer at the time of the arrest and the court must consider whether "the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the plaintiff] had committed or was committing an offense." ***Beck v. Ohio***, *379 U.S. 89, 91 (1964).* Notably, "the evidentiary standard for probable cause is significantly lower than the standard which is required for conviction." *See* Report and Recommendation, at p. 28, *quoting*, ***Wright v. City of Philadelphia***, *409 F.3d 595, 602 (3d. Cir. 2005).* Indeed, "[w]here a police officer possesses 'knowledge of a credible eyewitness…a reasonable jury could not find that [he] lacked knowledge of sufficient facts to establish probable cause to arrest." *See* Report and Recommendation, at p. 29, *quoting*, ***Merkle v. Upper Dublin School Dist.***, *211 F.3d 782, 790 (3d. Cir. 2000).* Quite simply, "courts have repeatedly held that reliance on a photo line-up identification of an alleged perpetrator by a victim or eyewitness provides police with probable cause." *See* Report and Recommendation, at p. 30 (collecting cases).

Here, Magistrate Judge Carlson correctly determined that "[u]nder the totality of the circumstances, even when viewed in the light most favorable to [Plaintiff], probable cause existed to arrest him for the shooting based on the victim's identification of him as the shooter, and the information from the informant that [Plaintiff] was bragging about the shooting." *See* Report and Recommendation, at p. 31. While Plaintiff asserts that no probable cause existed for Plaintiff's arrest based upon the same conclusory allegations that Detective

Ripley omitted facts from the affidavit of probable cause, the undisputed facts of record demonstrate that (a) an informant advised Detective Ripley that Plaintiff was bragging about the shooting and (b) the victim of the shooting positively identified Plaintiff as the person who shot him. Indeed, as "courts have repeatedly held that reliance on a photo line-up identification of an alleged perpetrator by a victim or eyewitness provides police with probable cause," Detective Ripley had probable cause to arrest Plaintiff and Plaintiff's malicious prosecution claim must be dismissed as a matter of law.

3. Plaintiff Failed to Present Evidence Establishing that Detective Ripley Acted Maliciously Toward Plaintiff.

Finally, "[a]ctual malice in the context of malicious prosecution is defined as either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." ***Lee v. Mihalich***, *847 F.2d 66, 70 (3d Cir. 1988).*

Here, Plaintiff asserts that Detective Ripley did not have probable cause to arrest him (by repeating the identical objections and arguments regarding the other elements of his malicious prosecution claim) and, therefore, he has established that Detective Ripley harbored malice toward him. However, as noted above, it is clear that there was probable cause to arrest Plaintiff. Moreover, it is clear that Plaintiff failed to make any argument that Detective Ripley acted out of spite, did not believe in the propriety of the prosecution or had any improper purpose. This is not surprising in light of Plaintiff's own deposition testimony, wherein he admitted that he spoke to Detective Ripley on one occasion and stated:

> Q. Okay, but so because Penny Marco is involved, why would Detective Ripley then falsely accuse you of a crime? Like what's the connection? I'm missing it.
>
> A. He probably doesn't know the situation, but -- he's probably just going on what she's saying. That's what I think. I think that they're just going their whole case according to what she said to them.
>
> Q. Okay, but do you have any reason to believe that Detective Ripley knew that that was false and not true?
>
> A. Yes.
>
> Q. Okay, what evidence do you have for that?
>
> A. I have no evidence to that. The only -- the only reason I think that is because, like I said, Penny Marco.

See Deposition of Plaintiff, at pp. 81-82, previously attached to Defendants' Motion for Summary Judgment, as Exhibit "D." Plaintiff's conclusory allegations that the informant, Penny Marco, acted improperly is far short of sufficient evidence to establish that Detective Ripley had any malice against Plaintiff to support a claim of malicious prosecution. To the contrary, the undisputed facts of record demonstrate that Detective Ripley was presented with information from a reliable informant that Plaintiff was bragging about shooting the victim and the victim himself positively identified Plaintiff as the witness. Moreover, as Magistrate Judge Carlson aptly noted:

> In sum, in October of 2009, Detective Ripley was presented with a compelling set of circumstances: a near-fatal shooting by an assailant who was at large. When the victim of the assault identified Luis Vega as his assailant from a photo line-up, Ripley possessed probable cause and had a responsibility to act upon this information. Yet, defendant Ripley continued to pursue this matter, even after initially identifying Vega as the shooter in this incident. That dogged pursuit of the truth by defendant Ripley ultimately exonerated Vega, and simply does not at this time provide any grounds for civil liability on behalf of the detective.

See Report and Recommendation, at p. 34. Accordingly, based on the foregoing, Plaintiff's malicious prosecution claim fails as a matter of law.

B. Magistrate Judge Carlson Correctly Determined that Detective Ripley is Entitled to Qualified Immunity.

Plaintiff's objections to Magistrate Judge Carlson's Report and Recommendation repeats the same arguments regarding the merits of the malicious prosecution claim and argues that Detective Ripley is not entitled to qualified because immunity because he, allegedly, omitted material facts from the affidavit of probable cause. It is well-established that the doctrine of "qualified immunity" balances two important interests — the need to hold public officials accountable when they exercise power irresponsibility and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.

See Report and Recommendation, at p. 11, *quoting*, ***Pearson v. Callahan***, *555 U.S. 223, 231 (2009)*. In order to obtain qualified immunity in a Section 1983 action premised on malicious prosecution, "a police officer must show his actions were objectively reasonably" and that a reasonable officer in his situation, aware of the same facts and circumstances, would have probable cause to make an arrest. *See* Report and Recommendation, at p. 14, citing, ***Orsatti v. N.J. State Police***, *71 F.3d 480, 483 (3d. Cir. 1995)* and ***Malley v. Briggs***, *475 U.S. 335, 344-345 (1986)*. Moreover, "[a]s a general rule, police who rely upon a photo lineup identification of a suspect to make an arrest are entitled to qualified immunity from damages on a false arrest claim" and cases throughout the country "recognize the commonsense principle that police should be empowered to act when a victim or witness identifies a perpetrator, without having concerns regarding potential civil liability arising out of a mistaken identification paralyzing their efforts." *See* Report and Recommendation, at p. 15 (citing cases). Indeed, "good faith mistakes arising out of photo lineup identifications are cloaked with qualified immunity; that qualified immunity is only vitiated if the evidence reveals that police engaged in some deliberate, intentional, wrongful manipulation of a photo line-up resulting in the arrest of an innocent person." *See* Report and Recommendation, at p. 14, citing ***Good v. Curtis***, *601 F.3d 393, 395 (5th Cir. 2010)*.

Here, Magistrate Judge Carlson correctly determined that Detective Ripley had probable cause to arrest Plaintiff based upon the positive identification of Plaintiff by the victim of the shooting. While Plaintiff generally asserts that the photographic array was problematic and that Detective Ripley allegedly omitted facts from the affidavit of probable cause, he has failed to present any evidence that Detective Ripley "engaged in some deliberate, intentional, wrongful manipulation of a photo line-up" to avoid a finding that qualified immunity applies in this case. First, as noted above, Magistrate Judge Carlson appropriately found that Detective Ripley did not omit any materials facts from his affidavit of probable cause—as there was an informant that provided evidence that Plaintiff bragged about shooting the victim and there was a positive identification from the victim himself. Moreover, Plaintiff's objections to the photo array are simply without merit. Indeed, the photographs were obtained directly from PennDot's system and the photo lineup was "compiled based on their resemblance to [Plaintiff's] complexion and race." As there is no evidence establishing that Detective Ripley engaged in any sort of wrongful manipulation of the photo line-up and the objective evidence unequivocally establishes that there was probable cause for a reasonable officer in Detective Ripley's position to find that Plaintiff did, in fact, shoot the victim, Detective Ripley is entitled to qualified immunity in this case. Accordingly, all claims against Detective Ripley must be dismissed as a matter of law, with prejudice.

III. CONCLUSION

Based upon the foregoing and for the reasons set forth in Defendants' Motion for Summary Judgment and Magistrate Judge Carlson's Report and Recommendation, Defendants respectfully request that Plaintiff's Objections to the Report and Recommendation of Magistrate Judge Carlson be denied.

Respectfully submitted,

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

BY: *s/John P. Gonzales*
JOHN P. GONZALES, ESQUIRE
Identification Number: 71265
2000 Market Street, Suite 2300
Philadelphia, PA 19103
Phone: (215) 575-2871
Fax: (215) 575-0856

Attorney for Defendants

Dated: July 8, 2013